Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

MARSHA GADDINI, *Petitioner,*

v.

RICHARD BONOMI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether motive should be a factor in determining whether a public employee's speech is a matter of public concern protected under the Constitution in a 42 U.S.C. Section 1983 First Amendment retaliation claim?

2. Whether a public employee's subjective motivation should be a dispositive factor in determining whether the employee's speech was on a matter of public concern in his 42 U.S.C. Section 1983 First Amendment retaliation claim?

LIST OF PARTIES

Petitioner before this Court and appellee in the proceedings below is Marsha Gaddini; and Respondent before this Court and appellant in the proceedings below is Richard Bonomi.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 4, 2001, petition for rehearing *en banc* denied on May 17, 2001.

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OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished, and is reprinted in the Appendix at App. 1 through App. 3. The order dated May 17, 2001 of the Court of Appeals for the Ninth Circuit denying the petition for rehearing *en banc* is reprinted at App. 4 through App. 5.

The Judgment of the United States District Court of the Northern District of California (Walker, D.J.) dated August 11, 1999 is reprinted at App. 6. The transcript of the oral argument on June 3, 1999 before the United States District Court for the

Northern District of California (Walker, D.J.) is reprinted at App. 7 through App. 22.

STATEMENT OF JURISDICTION

Plaintiff filed his complaint in the United States District Court for the Northern District of California citing federal jurisdiction under 42 U.S.C. § 1983. Defendant's motion for summary judgment thereafter was granted and Judgment was entered on August 11, 1999. App. 6. On appeal by plaintiff and appellant, in a memorandum not for publication, the Ninth Circuit on April 4, 2001, reversed and remanded the case to the district court. On May 17, 2001, the Ninth Circuit denied defendant and appellee's petition for rehearing *en banc*. The jurisdiction of this Court to review the judgment of the Ninth Circuit is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Plaintiff claimed that he had been retaliated against by his superior, Marsha Gaddini, for his alleged exercise of his First Amendment right to free speech. Plaintiff filed a retaliation claim under 42 U.S.C. Section 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Respondent Richard Bonomi ("Bonomi") is a parole agent who sued his superior, petitioner Marsha Gaddini ("Gaddini"), under 42 U.S.C. Section 1983 for an alleged violation of his First Amendment right to free speech. Prior to working for Gaddini, Bonomi had a history of maintaining poor records of his caseload of supervising parolees. Yet, soon after he began working in the San Francisco parole office with Gaddini, he went to her to complain that the agent whose caseload he had inherited failed to maintain proper records. Bonomi also complained about the state of the cases he inherited to his immediate supervisor, Antonio Raya. Mr. Raya advised Bonomi to record the date when he assumed the caseload so that "it would be obvious that [Bonomi] was not responsible for the lack of its supervision."

Sometime later, Bonomi received a memo from Regional Administrator, Ron Chun, which criticized Bonomi's pattern of poor work performance and informed Bonomi that he was being removed from special assignments due to his poor work performance. In response, Bonomi filed a work grievance to overturn Mr. Chun's decision to remove him from special

assignments. Bonomi blamed his poor work performance on his predecessor's alleged failure to maintain proper records. Other than complaining about his predecessor's record-keeping to show that he was not responsible for the state of his caseload, Bonomi did not complain about the record-keeping in any other context.

The United States District Court for the Northern District of California (Hon. Vaughn R. Walker) granted summary judgment in favor of Gaddini. App. 6. The district court held that Bonomi's criticism of the prior agent's record-keeping, the basis for his Section 1983 claim, was not a matter of public concern entitled to First Amendment protection. App. 20-22. The District Court found that the form and context of Bonomi's speech suggested that he was voicing a personal grievance, rather than attempting to alert his superiors to a matter of public concern. *Id.* The record showed that Bonomi's reasons for complaining about his predecessor had more to do with his personal grievances, rather than with the public interest. *Id.*

In an unpublished memorandum, the Ninth Circuit reversed the judgment of the district court, holding that Bonomi's speech was within the scope of public concern. App. 1-3. The Ninth Circuit's holding was based solely upon Bonomi's declaration in opposition to summary judgment that averred that he was extremely concerned about the state of his predecessor's record-keeping because there was a potential risk to the public if there were unsupervised parolees out on the streets. The Ninth Circuit concluded that Bonomi's declaration showed that his complaints were motivated by a concern for public safety. *Id.* Hence, taking his allegations as true, the Ninth Circuit found Bonomi's after-the-fact characterization of his subjective motivation "sufficient" to deem his speech as being on a matter of public concern, and therefore Constitutionally protected. *Id.*

SUMMARY OF THE ARGUMENT

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court articulated a test for determining whether a public employee's speech in the workplace merits constitutional protection under the First Amendment. This Court recognized that public employees retain some speech rights in the workplace. However, this Court also recognized that public employees' speech rights are not entitled to constitutional protection under the First Amendment unless they address a matter of public concern. Therefore, this Court held that whether a public employee's speech addresses a matter of public concern must be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

In the wake of *Connick*, the circuit courts have been in ever-widening conflict as to the application of the *Connick* factors. These courts have looked at a variety of factors in determining whether speech addresses a matter of public concern and have developed differing interpretations of the *Connick* test. For instance, some courts appear to emphasize content as a factor by relying on this Court's directive in *Connick* that only speech that addresses a matter of public concern is protected. Other courts appear concerned that because almost anything that occurs within a public agency could be of concern to the public, the inherent importance of the matters discussed by the employee should not be the focus of the test. These courts have relied on the employee's motivation in speaking, such as whether the speech was made primarily to speak out as a citizen on a matter that would be of concern to the public, or to further the employee's personal interest. As discussed below, the *Connick* test has typically been applied in an inconsistent manner among, and even within, the circuits. As a result of these divergent approaches, cases involving similar facts are routinely decided differently depending on the

analysis used by the particular court.

This conflict among the circuit courts has culminated in the development of a new test by the Ninth Circuit in this case that is not only in conflict with its own decisions, it clearly departs from this Court's decision in *Connick*. In *Bonomi*, the Ninth Circuit held that Bonomi's subjective motivation in criticizing his co-worker's record-keeping, as set forth in his declaration in opposition to summary judgment, was *dispositive* in determining that his workplace speech was constitutionally protected, as a matter of law. In so doing, the Ninth Circuit improperly ignored the *Connick* factors in favor of the employee's subjective intent.

The Ninth Circuit's wide divergence from *Connick* should alert this Court of the urgent need to clarify the public concern test. The confusion over how to apply the *Connick* test has created confusion, not only among the lower courts, but among public employers who must struggle to determine whether an employee's complaint is a simple personal grievance or an actionable matter of constitutional importance. Recognizing that virtually anything that occurs in a public workplace – funded by public monies and overseen by public officials – can potentially be construed as a "matter of public concern," employers must constantly assess whether they must tolerate or even accede to employee grievances or disruption, to avoid risking liability under Section 1983. Though such deliberation is commendable in the abstract, the absence of clear standards to guide public employers makes their efforts a gamble in many instances.

The Ninth Circuit's subjective motivation test in *Bonomi* complicates the employers' dilemma by requiring employers to essentially "read their employees' mind" to determine whether the subject speech merits constitutional protection. Moreover, public employers can never be certain that their decisions are

correct, as an employee remains free to assert a different intent in litigation. The Ninth Circuit's approach is also arbitrary and detrimental to employees because identical speech will be treated differently depending on subjective intent rather than content. In short, neither policy makers, public employers, nor public employees can predict how employment decisions will eventually be viewed by the courts. The time is ripe for this Court to clarify its *Connick* public concern test.

ARGUMENT

I.

THE PETITION SHOULD BE GRANTED TO GIVE CLEAR GUIDANCE TO THE CIRCUITS ON WHAT CONSTITUTES A MATTER OF PUBLIC CONCERN FOR SECTION 1983 CLAIMS, SPECIFICALLY WHAT CONSIDERATION, IF ANY, SHOULD BE GIVEN THE SPEAKER'S MOTIVATION.

"Lacking clear guidance from the Supreme Court, the circuits have struggled to develop a coherent approach as to what constitutes a matter of public concern." Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 551 (1998). In the eighteen years since this Court decided *Connick v. Myers*, 461 U.S. 138 (1983), the lower courts have looked at a variety of factors in determining whether speech addresses a matter of public concern and have developed differing interpretations of the

Connick test of "content, form, and context of a given statement, as revealed by the whole record." *Connick, supra*, 461 U.S. at 147-48.[1/]

As one commentator stated only five years after the *Connick* decision, "[L]ower courts have been anything but consistent in their determination of what speech is protected under *Connick* .... Although broad categories of cases can be identified, there exists contradictions within every category, leaving public employees and employers confused as to the scope of their free speech rights and responsibilities." Stephen

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1. This confusion over the scope of First Amendment protection goes beyond the judiciary. Commentators are likewise divided over how to define the contours of protected speech in the public workplace. *See* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988) (suggesting a return to the standard set forth in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968) so that speech that arguably addresses a matter of public concern as evaluated in the overall context of the legitimate interests of the parties, not as a threshold test as set forth in *Connick*); Karen B. Hoppmann, *Note, Concern with Public Concern: Toward a Better Definition of the Pickering/Connick Threshold Test*, 50 VAND. L. REV. 993 (1997) (advocating that the Supreme Court should redefine public concern from content-based analysis to purely context-based lines by importing the common-law agency doctrine of scope of employment); Rosenthal, *supra*, 25 HASTINGS CONST. L.Q. 529 (suggesting test governing incidental restrictions on speech rather than *Connick* public concern test); Rodric Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH L. REV. 5 (1999) (examining the Court's modern jurisprudence on the free speech rights of public employees and noting that when the Court's own balancing of relevant factors has twice been determined by a single vote, the Court may, at least for the present, prefer to say nothing further at all concerning public employees terminated for reason of their free speech); Michael L. Wells, *Section 1983: The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939 (2001) (suggesting melding "substantive" public employee speech law and "remedial" § 1983 law by establishing rules for public employee speech).

Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988) (See Part II for a discussion of the broad categories of cases and the contradictions within them). That confusion among and within the circuits offers neither public employees nor public employers any predictability as to how employment decisions will be viewed by the courts.

Within the conflict among the circuit courts' differing definitions of "public concern" speech, a basic point of confusion and conflict is how "motive" is used as a separate factor for determining whether the speech addresses a matter of public concern. The use of "motive" is often justified by citing the apparent significance accorded by this Court to the employee's motive or reason for speaking in *Connick*, thus suggesting that the criterion of "context" may properly include the employee's motive for speaking. Wells, *supra*, 35 GA. L. REV. at 964-66 & n.143. But its significance, or even relevance, is in conflict among and within the circuits. While some circuits have deemed the employee's motive to be determinative of whether speech relates to a topic of public concern, other circuits have rejected placing such significance on the employee's motive. *See, e.g., Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1297 (11th Cir. 1998) (examining motive as a criteria); *Button v. Kibby-Brown*, 146 F.3d 526, 529 (7th Cir. 1998) (stating interest in plaintiff's speech must be addressed to determine if it is a matter of public concern but it is not a dispositive factor); *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998) (motive is irrelevant in determining public concern); *Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 574-75 (6th Cir. 1997) (minimizing significance of motive); *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996) (motive must be examined); *Forsyth v. City of Dallas*, 91 F.3d 769, 773 (5th Cir. 1996) (motive must be examined); *Johnson v. Multnomah County*, 48 F.3d 420, 424-25 (9th Cir. 1995) (stating "motive should not be used as a litmus

test for public concern", rather, "content is the greatest single factor in the *Connick* inquiry"); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988) (motive determinative); *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3rd Cir. 1988) (motive was merely one factor to be considered but not controlling).

In trying to decipher motive, some courts rely on an "internal-external" distinction to determine whether a public employee's speech is protected. When the employee's speech is about the effects of agency management on the speaker's interest, it tends to be characterized as an "internal" personal grievance or as part of the job itself, rather than a matter of public concern. *See, e.g., Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 (11th Cir. 1997) (complaint of personal discrimination by agency not a public concern); *Roe v. City and County of San Francisco*, 109 F.3d 578, 585 (9th Cir. 1997) (noting that "if the communication is essentially self-interested ... then it is not of public concern"); *Bernheim v. Litt*, 79 F.3d 318, 324-25 (2nd Cir. 1996) (holding employee's speech related to employment conditions not public concern); *Workman v. Jordan*, 32 F.3d 475, 483 (10th Cir. 1994) (holding testimony related to termination grievance not public concern); *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990) (noting "it is settled that a public employee's expression of grievances concerning his own employment is not of public concern"). Such courts accord protection to speech that relates to the broad public import of agency mismanagement. *See, e.g., Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 168-70 (1st Cir. 1995) (holding that criticism of special education department and suggestion that school is violating special education laws is public concern speech); *Paradis v. Montrose Mem'l Hosp.*, 157 F.3d 815, 818 (10th Cir. 1998) (accusing hospital administrator of unethical and illegal conduct was protected speech).

Other courts de-emphasize the role of motivation and, instead, rely on the general *Connick* factors of form, content and context. In applying those factors, the courts often reach results without regard to, or in spite of, the purpose or motivation of the speaker. *See Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994) (reasoning that even though the plaintiff had claimed that the plan to privatize hospital services would lead to an unwise use of public funds, that much could be said virtually of anything at a public workplace with which an employee disagreed); *Berg v. Hunter*, 854 F.2d 238, 242-43 (7th Cir. 1988) (allegations of public misrepresentation of wage increases by employer held public concern despite entirely personal motives). One court found speech actionable even though plaintiff's subjective motivation for speaking was to secure a job for himself. *See Chappel, supra*, 131 F.3d 564, 578 (rejecting defendants' argument that plaintiff's subjective motivation was dispositive in determining whether his speech was on a matter of public concern).

Regardless of the approach taken by the courts in any particular case, the resolution of Section 1983 cases continues to be problematic. Even a cursory review of existing case law indicates that similar cases will be decided differently depending upon the judicial forum. Such inconsistency in the decision-making process renders judicial review unpredictable and, to some extent, arbitrary. Accordingly, the petition should be granted to permit this Court to resolve the split among the circuit courts and to clear the confusion over the divergent interpretations of the *Connick* factors for determining whether a public employee's speech is on a matter of public concern.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT THE PUBLIC EMPLOYEE'S SUBJECTIVE INTENT IS DISPOSITIVE AS TO WHETHER HIS SPEECH MERITS FIRST AMENDMENT PROTECTION IS IN CONFLICT WITH PRIOR NINTH CIRCUIT CASES AND IS A RADICAL DEPARTURE FROM THE TEST THIS COURT SET FORTH IN *CONNICK*.

The split among the circuit courts in interpreting the *Connick* public concern test has caused a problematic inconsistency in Section 1983 First Amendment law. The Ninth Circuit's decision in *Bonomi* exacerbated this confusion because the court departed from the *Connick* analysis altogether. In *Bonomi,* the Ninth Circuit held that the employee's subjective motivation in making his speech (his criticism of his co-worker's record-keeping), as evidenced by a declaration in opposition to summary judgment, was dispositive in determining that the speech is on a matter of public concern within First Amendment protection. In so doing, the Ninth Circuit improperly discarded the objective factors of form, content and context established by this Court in *Connick*.

As an initial matter, this Court should note that the Ninth Circuit's decision in *Bonomi* is in direct conflict with its own prior decisions. The Ninth Circuit held in previous cases that motive is **not** dispositive in determining whether a public employee's speech is a matter of public concern. *See Roe, supra*, 109 F.3d at 585 (speaker's intended audience is not dispositive); *Johnson, supra*, 48 F.3d at 424 (recklessly false

statements are not per se unprotected by the First Amendment); *Havekost v. United States Department of the Navy*, 925 F.2d 316, 318 (9th Cir. 1991) ("Motive should not be used as a litmus test for public concern.").

More importantly, the Ninth Circuit's decision in *Bonomi* is improper because it creates a new test for determining public concern that radically departs from this Court's decision in *Connick*. In *Connick*, this Court held that a public employee's speech that consists primarily of individual personnel disputes and grievances, and would be of no relevance to the public's evaluation of the performance of government agencies, is not a matter of public concern within the scope of the First Amendment. *Connick, supra,* 461 U.S. at 1690. In analyzing whether speech constitutes a matter of public concern, this Court directed federal courts to examine the "content, form and context of the given statement as revealed by the whole record." *Id.* at 147-48.

The Ninth Circuit ignored the *Connick* factors and formed its own test. The Ninth Circuit's test for determining whether a public employee's speech is a matter of public concern relies on the employee's subjective intent, as characterized by the employee after-the-fact, in speaking on a workplace matter. In its written decision, the Ninth Circuit found that Bonomi's claimed intent as set forth in his declaration in opposition to summary judgment, that he was "motivated by a concern for public safety," when he criticized the record-keeping of the parole agent whose cases he had inherited, was "sufficient to bring Bonomi's speech within the scope of public concern." App. 2. The Ninth Circuit's holding that the public employee's subjective motivation is dispositive plainly departs from this Court's holding in *Connick*. *See Chappel, supra*, 131 F.3d at 574 (concluding that subjective motivation test directly conflicts with *Connick* because if motive were dispositive, the Court's inquiry in *Connick* could only have resulted in finding either

that all of the employee's speech was public concern or that none of it was).

The Ninth Circuit's rejection of the objective factors set forth in *Connick*, in favor of the employee's subjective motivation, is inherently flawed because the test serves to transform workplace speech that is fundamentally a common and petty employment grievance into a constitutional case. Moreover, as a practical matter, subjective motivation is easily asserted and difficult to verify, especially where, as here, it first appears in a litigation declaration.

The Ninth Circuit's flawed approach clearly resulted in an erroneous ruling in this case. Had the Ninth Circuit applied the objective *Connick* factors, the district court's dismissal on summary judgment would have been sustained. The record revealed that Bonomi had a history of poor parolee case supervision before he began working with defendant Gaddini. The content of his speech was limited to his criticism of a fellow parole agent's record-keeping, and its adverse impact on Bonomi's own work performance. Distilled to its essence, Bonomi's criticism of his predecessor's record-keeping is the quintessential employee gripe to management – that the employee should not be disciplined for performance problems because the problems were caused by a co-worker.

The Ninth Circuit's subjective motivation test is not only an improper departure from *Connick*, the test is inconsistent with the purpose of the First Amendment. Speech on matters of public concern is protected by the Constitution because the public has an interest in receiving information that would be of concern to the community, not because the speaker subjectively *intends* to speak on an issue of public importance. As this Court stated, "[T]he core value of the Free Speech Clause of the First Amendment" is the "public interest in having free and unhindered debate on matters of public importance." *Pickering*,

supra, 391 U.S. at 571-72. Therefore, it is contrary to logic to hold that an individual employee's personal workplace grievance, which would otherwise be of no interest to the public, could be elevated to a matter of public concern simply because the employee had the subjective belief that his grievance against his government employer was of interest to the public. "[A] public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." *Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986).

Moreover, the Ninth Circuit's subjective motivation test is unsound because the test will take into account the after-the-fact declaration of the employee regarding his subjective intent as the dispositive factor in determining whether his speech is on a matter of public concern. In *Bonomi,* the Ninth Circuit's decision relied on the plaintiff's declaration, served in opposition to Gaddini's motion for summary judgment, that his motive for criticizing his co-worker's record-keeping was a concern for public safety. The court's reliance on Bonomi's self-serving declaration prepared during litigation is improper because of the inherent unreliability of such a declaration. *See Ayoub v. Texas A & M University*, 927 F.2d 834, 837 (5th Cir. 1991) (non-contemporaneous allegation of motive was improper evidence in section 1983 speech case); *Carey v. Aldine Indep. Sch. Dist.*, 996 F.Supp. 641, 649 (S.D. Tex. 1998) (in Section 1983 speech case, "plaintiff's after-the-fact declaration that her complaints were not made to benefit herself may be contradicted by the circumstances under which the complaints were made"). There is the danger that a crafty employee with a modicum of imagination, or legal advice, can cast virtually any workplace grievance in terms that will satisfy the Ninth Circuit's subjective motive test. "A test does little to protect legitimate managerial prerogatives if it depends so heavily on the fortuity of how an employee frames his grievance, and on the paucity of legal advice available to many public employees.

Indeed, this is a triumph of form over substance." *Rosenthal, supra*, 25 Hastings L.Q. at 556. The Ninth Circuit's reliance on subjective motive as a dispositive factor in determining "public concern" speech exacerbates the existing confusion and conflict among the circuits.

Because the Ninth Circuit's subjective motivation test is in direct conflict with *Connick* and exacerbates the split among the circuit courts and its own prior decisions regarding the application of the *Connick* factors, the petition should be granted.

III.

THE PETITION SHOULD BE GRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION FOR PUBLIC SECTOR EMPLOYERS REGARDING THEIR DUTIES AND RESPONSIBILITIES TO THEIR EMPLOYEES UNDER THE CONSTITUTION.

The split and confusion in the circuit courts regarding the test for determining whether a public employee's speech merits constitutional protection, in addition to the radical divergence from the *Connick* test by the Ninth Circuit, have left public employers in a quagmire. Public employers are constantly struggling with the tensions inherent in their dual role as government entities and employers. As government entities, public employers are limited by the constitution and must refrain from taking action that may be permissible in the private sector. At the same time, public employers have a legitimate business interest in the efficiency of their operations and must be free to make necessary personnel decisions.

This tension has been exacerbated by the ongoing and worsening confusion in the circuit courts as to the definition of protected speech in the workplace. The uncertainty of judicial review has adversely impacted both public employers and their employees. Because the circuit courts' conflicting tests for determining public concern can potentially render almost anything that occurs within a government office a matter of public concern, employers find themselves in a dilemma. They must frequently choose between exercising their managerial prerogative to control a disruptive employee and risk violating the employee's constitutional rights, or to do nothing and undermine the public interest in efficiency and orderly public administration.

Moreover, the employer is often forced to make these employment decisions on an *ad hoc* basis without the benefit and guidance of consistent legal authority. The determination of whether an employee's speech merits constitutional protection is ultimately in the hands of the judiciary, as the *Connick* public concern test requires the courts to decide which topics are of proper public concern. The lack of consistent judicial standards also burdens the courts' resources, as the judiciary becomes embroiled in overseeing and second-guessing management decisions of public employers. The impact on public employees is no less adverse. Employees who wish to speak out on matters of public concern may surely pause in doing so if they are uncertain whether speaking out will negatively impact their job.

Public employers who are within the jurisdiction of the Ninth Circuit face a far greater dilemma because of the inherent flaws in the Ninth Circuit's subjective motivation test. First, it would be impractical and unfair to require an employer to ascertain an employee's subjective intent when the employee speaks on an apparently internal and personal matter. Second, the practical effect of the subjective motivation test is it will

virtually transform a public employee's workplace grievance, no matter how personal or mundane, into a constitutional case if the employee's speech was intended for the public good.

The Ninth Circuit's subjective motivation test will also encourage and facilitate gamesmanship in constitutional litigation. A public employee who files a Section 1983 speech claim against his employer can defeat summary judgment simply by submitting an after-the-fact declaration asserting that he was motivated by a matter of public concern in making a workplace grievance. In *Connick*, this Court cautioned that public offices should be kept from being run as "roundtables for employee complaints over internal office affairs." *Connick, supra*, 461 U.S. at 149. The Ninth Circuit's subjective motivation test virtually guarantees that federal courts will become a forum for such disputes.

For these reasons, this Court should grant the petition to clarify the *Connick* analysis for the benefit of lower courts, public employers and public employees.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Dated: August 14, 2001

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD BONOMI, Plaintiff-Respondent, v. MARSHA GADDINI, Defendants-Appellee.	No. 99-17070 D.C. No. CV-97-02320-VRW MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted March 14, 2001
San Francisco, California

Before: NOONAN, McKEOWN and WARDLAW, circuit judges.

Plaintiff-Appellant Richard Bonomi appeals the district court's grant of summary judgment to Defendant-Appellee Marsha Gaddini. He contends that the district court erred when it concluded that the speech

that allegedly caused Gaddini to retaliate against Bonomi did not pertain to a matter of public concern. We have jurisdiction pursuant to 28 U.S.C. § 1291. We agree, and thus we reverse.

Bonomi contends that he complained about the state of the parole records that he inherited from a predecessor, and that his complaints were motivated by a concern for public safety. The district court determined that "this characterization . . . is not supported by the facts in the record." On the contrary, these allegations are supported by Bonomi's declaration, in which he avers that he "was alarmed at the state of he records," and that this caused him to be "extremely concerned that there were any number of 'high control' [parolees] out on the streets which presented a risk to the public."

Taking these allegations to be true, as we must for purposes of summary judgment, they are sufficient to bring Bonomi's speech within the scope of public concern. We have consistently held that mismanagement in the criminal justice system, and the resulting potential threat to the public, is a matter of public concern. See Hyland v. Wonder, 972 F.2d 1129, 1137 (9th Cir. 1992) ("abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law enforcement officials at Juvenile Hall . . . . are of vital interest to citizens"); Gillete v. Delmore, 886 F.2d 1194, 1197 (9th Cir. 1989) ("the manner in which police and fire fighters performed their duties" is a matter of public concern); McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) ("the competency of the

police force is surely a matter of great public concern"). Likewise, for purposes of summary judgment, Bonomi's complaints relate to a matter of public concern. Therefore, we reverse and remand for further proceedings.

Gaddini argues in the alternative that, even if Bonomi did speak on a matter of public concern, summary judgment should nonetheless be affirmed because Bonomi has failed to prove that the protected speech led to the allegedly retaliatory actions. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977); Gilbrook v. City of Westminister, 177 F.3d 839, 855 (9th Cir. 1999). The district court did not reach this issue, and we decline to do so for the first time on appeal. Instead, we leave it for the district court to consider on remand.

REVERSED AND REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD BONOMI, Plaintiff-Respondent, v. MARSHA GADDINI, Defendants-Appellee.	No. 99-17070 D.C. No. CV-97-02320-VRW ORDER

Before: NOONAN, McKEOWN and WARDLAW, circuit judges.

The panel has unanimously voted to deny the petition for rehearing. Judges McKeown and Wardlaw have voted to deny the petition for

rehearing en banc and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD BONOMI,	)
	)
Plaintiff,	) No. C 97-2320 VRW
	)
v.	) **JUDGMENT**
	) Fed. R. Civ. Pro. 58
MARSHA GADDINI,	)
	)
Defendant.	) [Entered in Civil Docket
	) Aug. 11, 1999]
	)

This action came on for decision before the court, the Honorable Vaughn R. Walker, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that for the reasons stated on the record on June 3, 1999, defendant's motion for summary judgment is GRANTED, that plaintiff take nothing, that the action be dismissed on the merits and that defendant recover of plaintiff, her costs of action.

Dated at San Francisco, California, this 9th day of August, 1999.

WYNETTE BAILEY, DEPUTY CLERK
United States District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

RICHARD BONOMI,	)	C 97-2320 VRW
	)	
PLAINTIFF,	)	SAN FRANCISCO,
	)	CALIFORNIA
v.	)	THURSDAY,
	)	JUNE 3, 1999
MARSHA GADDINI,	)	
AND DOES 1-20, INCLUSIVE,	)	
	)	
DEFENDANTS.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF:

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BY FIEL D. TIGNO
AND
VICTORIA WU
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REPORTED BY:

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ROSITA FLORES, OFFICIAL COURT REPORTER, USDC

THURSDAY, JUNE 3, 1999 10:30 A.M.

THE CLERK: CALLING CIVIL 972320 RICHARD BONOMI VERSUS MARSHA GADDINI, ET AL.

COUNSEL, YOUR APPEARANCES FOR THE RECORD, PLEASE.

MR. WEISS: WILLIAM WEISS, APPEARING ON BEHALF OF PLAINTIFF, RICHMOND BONOMI.

MS. TIGNO: GOOD MORNING, YOUR HONOR.

FIEL TIGNO, APPEARING ON BEHALF OF MARSHA GADDINI.

MS. WU: GOOD MORNING, YOUR HONOR.

VICTORIA WU, ON BEHALF OF DEFENDANT, MARSHA GADDINI.

THE COURT: VERY WELL. BEFORE THE COURT IS DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

WHAT DO COUNSEL HAVE TO ADD TO THEIR PAPERS?

MR. WEISS: WELL, DEFENDANT FILED, SO DO YOU WANT HER TO ADDRESS YOU FIRST OR –

THE COURT: WELL, LET ME SEE IF I UNDERSTAND WHAT REALLY IS AT ISSUE HERE. THERE IS AN AWFUL LOT OF PAPERS, BUT I GATHER THIS ALL BOILS DOWN TO THE ISSUE OF WHETHER THE DEFENDANT UNCONSTITUTIONALLY RETALIATED AGAINST THE PLAINTIFF FOR EXERCISING HIS

FIRST AMENDMENT RIGHTS IN CLAIMING THAT LEVARIO MAINTAINED POOR RECORDS.

THAT'S WHAT THIS CASE IS ABOUT, CORRECT?

MR. WEISS: PARTIALLY. IT WASN'T THAT LEVARIO MAINTAINED POOR RECORDS. IT WAS THAT THERE WAS A CONCERN THAT THERE WERE DANGEROUS FELONS UNSUPERVISED.

THE COURT: THERE WERE WHAT?

MR. WEISS: THERE WERE DANGEROUS FELONS ON THE LIST OF LEVARIO'S CASES THAT WERE UNSUPERVISED, AND THAT WAS THE BASIS FOR THE COMPLAINT WAS THAT, HERE'S AN UNORGANIZED FILE. THERE WAS NO FIELD BOOK. WE DON'T KNOW WHERE THESE PEOPLE ARE. THAT'S WHY WE PUT IN A COUPLE OF NEWSPAPER ARTICLES ABOUT THE DANGER TO THE PUBLIC, BECAUSE WE STRONGLY ARGUE THAT THE SUPERVISION OF THESE PAROLEES IS A MATTER OF PUBLIC CONCERN. SO THAT WHEN THE PLAINTIFF WENT TO THE DEFENDANT, HE WASN'T JUST COMPLAINING THAT THE RECORDS WERE IN POOR SHAPE, HE WAS WORRIED THAT THERE WAS GOING TO BE PROBLEMS AND, INDEED, THERE WERE PROBLEMS AFTERWARDS.

THE COURT: ALL RIGHT. BUT THAT REALLY IS NOT SOMETHING THAT APPEARS CLEARLY IN THE COMPLAINT.

MR. WEISS: I DIDN'T DRAFT THE COMPLAINT.

THE COURT: NO. I DIDN'T SAY YOU DID.

MR. WEISS: I KNOW, BUT IN FACT WHEN I SUBSTITUTED IN, I THINK, WHAT, NOVEMBER OR DECEMBER, YOU REMARKED I MAY BE JUMPING INTO THE ABYSS. BUT I DID REVIEW THE COURT'S ORDER EARLIER ON THE MOTION TO DISMISS WHEN MR. BROWN WAS REPRESENTING THE PLAINTIFF; AND IN LEAVING THE 1983 CAUSE OF ACTION IN, YOU POINTED OUT SEVERAL THINGS IN THERE; NAMELY, THAT THERE'S A PARAGRAPH THAT'S KIND OF VAGUE, BUT IT SAYS THAT IT ALLEGES THAT THERE WAS OTHER ACTS OF RETALIATION AND THINGS GOING ON; BUT THE ESSENCE OF THE COMPLAINT WAS THAT HE SUFFERED RETALIATION AS A RESULT OF CONSTITUTIONAL ACTIVITY.

THE COURT: AND THE CONSTITUTIONAL ACTIVITY IS THE EXPRESSION IF HIS CONCERN ABOUT THE STATE OF THE RECORD THAT WERE BEING MAINTAINED AND THE EFFECT THAT THAT MIGHT HAVE ON THE SUPERVISION OF THESE PAROLEES.

MR. WEISS: THERE WAS THAT, AND THERE WAS ALSO THE MATTER OF HE HAD REPORTED A SUPERVISOR NAMED BILL SNIPES FOR FRAUDULENT OVERTIME, AND THAT CHARGE WAS SUSTAINED. THAT'S ANOTHER BASIS. AND ALTHOUGH THE DEFENDANT SAYS WE DIDN'T REALLY

EMPHASIZE THAT IN OUR OPPOSITION, WE DID MENTION IT BECAUSE WE POINTED OUT THE DEFENDANT REMARKED TO THE PLAINTIFF THE VERY SAME DAY HE CAME INTO THE OFFICE IN SAN FRANCISCO THAT, "WHY IS IT THAT PEOPLE HAVE SUCH A POOR VIEW OF YOU," OR WORDS TO THAT EFFECT, "OR POOR IMPRESSION OF YOU?"

SO THERE WAS THAT, ADDITIONALLY, BUT AFTER I GOT INTO THE CASE AND CONDUCTED DISCOVERY, I THOUGHT MORE IMPORTANTLY AND THE MORE IMMEDIATE ISSUE -- I SEE YOUR HONOR IS STRAINING TO HEAR ME. SHOULD I SPEAK UP?

THE COURT: WELL, WE ARE DEALING WITH CLAIMS THAT AREN'T REALLY WELL-DEFINED BY THE PLEADINGS HERE, SO THAT'S WHY I'M GOING THROUGH THIS.

MR. WEISS: I UNDERSTAND, BUT THE REPORTING OF MR. SNIPES WAS ALSO ANOTHER FACTOR.

THE COURT: BUT IS THAT AN ISSUE IN CONNECTION WITH THE PRESENT MOTION?

MR. WEISS: IT'S A FACTOR, YES, BECAUSE WE PUT IN OUR OPPOSITION THAT, ASIDE FROM THE LEVARIO PROBLEM, THERE WAS THE COMMENTS MADE ABOUT MR. BONOMI, WHY THE DEPARTMENT HAD SUCH A POOR IMPRESSION OF HIM, AND, THEN, THERE WAS A DISCUSSION WHICH ENSUED ABOUT MR. SNIPES.

THE COURT: WELL, LET'S NOT JUST TELL A STORY HERE. THIS HAS TO BE, DOES IT NOT, A RETALIATION CLAIM WHERE YOU EXERCISED FIRST AMENDMENT RIGHTS?

MR. WEISS: CORRECT.

THE COURT: AND THE FIRST AMENDMENT RIGHTS THAT WERE EXERCISED WERE THE EXPRESSIONS OF CONCERN ABOUT THE STATE OF THE RECORDS, THE PLAINTIFF'S STATEMENTS ABOUT WHAT HE REGARDED AS THE POOR STATE OF THE RECORD KEEPING, CORRECT?

MR. WEISS: YES, BUT IN COMPLAINING OF THE POOR RECORD KEEPING, HE WAS EXPRESSING CONCERN FOR PUBLIC SAFETY.

THE COURT: I UNDERSTAND THAT.

MR. WEISS: OKAY, THEN, CORRECT.

THE COURT: I UNDERSTAND. I'M NOT FOR A MOMENT DEALING WITH THE MOTIVATION, BUT IT'S THE STATEMENT. THAT IS WHAT I AM DEALING WITH ON THIS MOTION, CORRECT?

MR. WEISS: CORRECT.

THE COURT: ANYTHING ELSE?

MR. WEISS: AND THE THING ABOUT MR. SNIPES.

THE COURT: WHAT ABOUT SNIPES?

MR. WEISS: HE WAS THE SUPERVISOR THAT WAS DISCIPLINED FOR FRAUDULENT OVERTIME AND PLAINTIFF--

THE COURT: BUT THAT CLAIM WAS SUSTAINED, I BELIEVE.

MR. WEISS: RIGHT, IT WAS.

THE COURT: SO WHAT DOES THAT HAVE TO DO WITH THE PRESENT ACTION?

MR. WEISS: WELL, THAT'S PART -- THAT'S MORE OF THE DEFENDANT'S MOTIVATION TO RETALIATE AGAINST PLAINTIFF. HERE'S SOMETHING ELSE.

THE COURT DISMISSED THE DEPARTMENT IN THE 12(B) 6 MOTION, AND I SUSPECT THAT THE SNIPES MATTER WOULD APPLY GREAT SIGNIFICANT IN THAT AS WELL, BUT DEFENDANT GADDINI DID MAKE REMARKS WHICH LEAD US TO BELIEVE THAT SNIPES ALSO -- THE SNIPES INCIDENT WAS ANOTHER FACTOR IN ADDITION TO THE LEVARIO RECORDS PROBLEM.

THE COURT: ALL RIGHT. SO I HAVE TO CONSIDER SNIPES' STATEMENT. ANYTHING ELSE?

MR. WEISS: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MS. TIGNO: WELL, YOU HONOR, FIRST OF ALL, YOUR HONOR IS CORRECT AS TO THE LEVARIO MATTER.

THE PLAINTIFF IS ALLEGING THAT HE WAS COMPLAINING ABOUT THE RECORD KEEPING OF THE PRIOR AGENT WHOSE CASELOAD HE INHERITED, BASICALLY

CONCERNED ABOUT BEING HELD ACCOUNTABLE IN THE WORKPLACE FOR THE STATE OF THE RECORD KEEPING.

AS TO BILL SNIPES, THIS WAS ADDRESSED FULLY IN OUR MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFF RAISED THIS DURING THE DEPOSITION. PLAINTIFF TESTIFIED THAT HE REPORTED BILL SNIPES IN 1991 OR 1992, MORE THAN THREE YEARS BEFORE HE BEGAN WORK FOR GADDINI. THIS WAS SET FORTH IN HIS DEPOSITION TESTIMONY. HE ALSO TESTIFIED THAT GADDINI, WHO IS THE SOLE DEFENDANT IN THIS CASE, WAS NOT INVOLVED IN THE BILL SNIPES MATTER AT ALL, AND HE ALSO TESTIFIED THAT BILL SNIPES WASN'T EVEN WORKING WITH MARSHA GADDINI WHEN PLAINTIFF REPORTED BILL SNIPES.

IN FACT, ACCORDING TO PLAINTIFF, BILL SNIPES NEVER WORKED WITH MARSHA GADDINI AT ALL. SO THIS WAS TO SHOW THAT THE BILL SNIPES MATTER WAS A FACTOR, A COMPLAINT, THAT HAD BEEN SUSTAINED BY THE DEPARTMENT AND TO SHOW THE CAUSATION, THE CAUSAL ELEMENT BEING VERY TENUOUS, IF NON-EXISTENT, WHICH WE ARGUE. YET, DEFENDANT GADDINI WAS NOT EVEN INVOLVED IN THE SNIPES MATTER, AND PLAINTIFF ADMITTED AT THE DEPOSITION THAT GADDINI WAS NOT INVOLVED IN THE SNIPES MATTER. PLAINTIFF ADMITTED AT THE DEPOSITION THAT GADDINI WASN'T EVEN WORKING

WITH BILL SNIPES, HIS FORMER SUPERVISOR, WHEN PLAINTIFF REPORTED HIM, AND THAT HE REPORTED HIM AND THE CHARGES WERE SUSTAINED IN 1991 OR 1992. HE BEGAN WORKING WITH MARSHA GADDINI FOR THE FIRST TIME IN 1995.

THE COURT: ALL RIGHT. ANYTHING TO ADD?

MS. WU: NO.

THE COURT: COUNSEL?

MR. WEISS: WELL, YES. THE FACT WHETHER THEY WERE TOGETHER OR NOT DOESN'T MAKE A DIFFERENCE. THE IMPORTANT FACTOR IS WHETHER SHE USED THAT AGAINST HIM. I MEAN, SHE'S A SUPERVISOR. SHE REPORTS ANOTHER SUPERVISOR. HE COMES UNDER HER SUPERVISION AND THEN SOMETHING HAPPENS TO HIM. HE'S ALREADY GOT A BAD NAME WHEN HE COMES IN THERE, THE FIRST VERY DAY.

THERE IS UNCONTROVERTED EVIDENCE THAT HE SAID TO HER -- OR THAT SHE HAD SAID TO HIM, "HOW CAN THE DEPARTMENT HAVE A POOR PERCEPTION OF YOU?" AND THEN THEY DISCUSSED THE SNIPES MATTER.

SO THAT IS A FACTOR. THE FACT OF WHETHER THEY WORK TOGETHER OR NOT, THAT HE KNOWS ABOUT SOME CONVERSATION, DOESN'T REALLY MAKE ANY DIFFERENCE. THE FACT IS ONE SUPERVISOR GETS IN TROUBLE BECAUSE

OF ANOTHER SUPERVISOR HOLDS IT AGAINST HIM DOES SOMETHING, AMONG OTHER REASONS BESIDE THE LEVARIO MATTERS. SO THERE IS A NUMBER OF FACTORS WHEN YOU PUT THEM TOGETHER -- SEE, I THINK THAT' S A PROBLEM OF DEFENDANT'S BRIEF IS THAT YOU MIGHT TAKE ONE FACTOR AND SAY, "WELL, GEE, YOU CAN'T PROVE THIS. BECAUSE YOU WERE PRIVY TO THAT CONVERSATION, THEREFORE, YOU CAN'T PROVE IT." BUT WHEN YOU START LOOKING AT ALL THE EVENTS TIED TOGETHER, YOU START TO SEE A PATTERN OF WHAT LOOKS LIKE BAD BEHAVIOR, AND THAT'S WHY I THINK THE SUMMARY JUDGMENT SHOULD BE DEFEATED.

I HAVE THE SPECIFIC POINTS, LIKE, FOR EXAMPLE, THE RON CHUN MEMO. SHE HAD NOTHING TO DO WITH THAT. SHE APPARENTLY DID THE AUDIT AND FORWARDED IT UP TO THE CHAIN OF COMMAND. RON CHUN MENTIONED RIGHT IN THE MEMO THAT HE HAD TALKED TO GADDINI, TALKED ABOUT IT.

SHE SAYS UNDER OATH SHE HAD NOTHING TO DO WHATSOEVER WITH THE KELLY WHIPPLE INVESTIGATION, NOTHING. THAT'S NOT TRUE. THERE IS A DEPARTMENT MEMO THAT PUT HER IN THERE ON THE INITIAL INVESTIGATION. SHE SAYS SHE WOULD NEVER INTERFERE WITH AN ARREST EVER. WELL, THE AGENT THAT WAS

PULLED OFF THERE COMPLETELY CONTROVERTS THAT IN HIS DECLARATION. SO, THEN, THEY TRIED -- YOU KNOW, THEN THE POINT IS THAT YOU SAY THAT MR. BADDINI DIDN'T KNOW THAT THE PAROLEE WAS DANGEROUS. THERE WAS A REPORT THAT THE PAROLEE WAS APPARENTLY HIGH ON CRACK AND PHYSICALLY THREATENED THE DRUG COUNSELOR, BUT THE FACT IS SHE SAID UNDER OATH SHE HAD BEEN A PAROLE OFFICER FOR TWENTY YEARS BEFORE BEING A SUPERVISOR. SHE WOULD NEVER, NEVER INTERFERE WITH AN ARREST, AND IT'S NOT TRUE. SHE DID. AND WHEN YOU INTERFERE WITH AN ARREST, YOU'RE CREATING RISK. EVERY ARREST HAS A SITUATION OF RISK.

MY POINT IS, THERE IS A WHOLE SERIES OF EVENTS THAT ARE STRUNG TOGETHER. THAT'S WHY WE CITED THAT CASE ON CIRCUMSTANTIAL EVIDENCE.

DID YOU WANT ME TO –

THE COURT: IS THE MATTER SUBMITTED?

MR. WEISS: HUH, OKAY.

MS. TIGNO: YES, YOUR HONOR.

MR. WEISS: YES, YOUR HONOR. I GUESS YOU DON'T WANT ANY MORE ARGUMENT.

THE COURT: WELL, THE MATTER IS BEFORE THE COURT ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

THE PLAINTIFF, RICHARD BONOMI, IS A PAROLE AGENT FOR THE DEPARTMENT OF CORRECTIONS OF THE STATE OF CALIFORNIA, AND HE BROUGHT THIS ACTION PURSUANT TO TITLE 42, UNITED STATES CODE, SECTION 1983, ALLEGING THAT HIS SUPERVISOR, DEFENDANT GADDINI, VIOLATED HIS FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH BY RETALIATING AGAINST HIM BECAUSE HE CRITICIZED HIS PREDECESSOR, AN AGENT LEVARIO, FOR AN UNSPECIFIED ACT OF COWARDICE BECAUSE LEVARIO MAINTAINED POOR RECORDS.

BONOMI MAINTAINS THAT LEVARIO AND GADDINI WERE ROMANTICALLY INVOLVED AND MAKES OTHER CHARGES OF A KIND THAT HAD BEEN DESCRIBED IN THE COLLOQUY WITH COUNSEL THIS MORNING.

TO PREVAIL UNDER SECTION 1983 ON A CLAIM THAT HE SUFFERED AN ADVERSE EMPLOYMENT ACTION AS AN CONSEQUENCE OF EXERCISING HIS FIRST AMENDMENT, SPEECH RIGHTS, THE PUBLIC EMPLOYEE MUST PROVE THAT THE CONDUCT OF ISSUE WAS CONSTITUTIONALLY PROTECTED. A PUBLIC EMPLOYEE'S SPEECH IS NOT PROTECTED UNDER THE FIRST AMENDMENT UNLESS:

ONE. THE SPEECH INVOLVED IS A MATTER OF PUBLIC CONCERN; AND

TWO. THE EMPLOYEE'S INTEREST IN EXPRESSING

HIMSELF OUTWEIGHS THE STATE'S INTEREST IN PROMOTING WORKPLACE EFFICIENCY AND AVOIDING WORKPLACE DISRUPTION.

WHETHER AN EMPLOYEE'S SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN MUST BE DETERMINED BY THE CONTENT OR CONTEXT OF A GIVEN STATEMENT AS REVEALED BY THE ENTIRE RECORD.

ONE CRITICAL INQUIRY IN DETERMINING WHETHER THE SPEECH ADDRESSED A MATTER OF PUBLIC CONCERN IS WHETHER THE EMPLOYEE SPOKE IN ORDER TO BRING WRONGDOING TO LIGHT OR, MERELY, TO FURTHER SOME PURELY PRIVATE INTEREST. ALTHOUGH THE SUPREME COURT HAS RECOGNIZED THAT PRIVATELY-MADE STATEMENTS ARE ENTITLED TO FIRST AMENDMENT PROTECTION, WHETHER AN EMPLOYEE MADE ANY ATTEMPT TO REACH THE GENERAL PUBLIC WITH HIS SPEECH REMAINS A FACTOR TO BE CONSIDERED IN DETERMINING WHETHER THE SPEECH INVOLVED A MATTER OF PUBLIC CONCERN.

THE SUPREME COURT HAS WARNED THAT THE FIRST AMENDMENT DOES NOT REQUIRE A PUBLIC OFFICE TO BE RUN AS A ROUND TABLE FOR EMPLOYEE COMPLAINTS OVER INTERNAL OFFICE AFFAIRS. WHEN AN EMPLOYEE'S EXPRESSION CANNOT FAIRLY BE CHARACTERIZED AS RELATING TO ANY MATTER OF POLITICAL, SOCIAL OR

OTHER CONCERN TO THE COMMUNITY, THE GOVERNMENT OFFICIALS SHOULD ENJOY WIDE LATITUDE IN MANAGING THEIR OFFICES WITHOUT INTRUSIVE OVERSIGHT BY THE JUDICIARY IN THE NAME OF THE FIRST AMENDMENT.

IN THIS CASE, BONOMI SEEKS TO CHARACTERIZE HIS COMPLAINT REGARDING THE RECORDS KEPT BY HIS PREDECESSOR AND THE OTHER MATTERS THAT HAD BEEN RAISED AS AN EXPRESSION OF ALARM AND CONCERN THAT IMPLICATED PUBLIC SAFETY BECAUSE OF THE IMPORTANCE OF MONITORING PAROLEES' ACTIVITIES. THIS CHARACTERIZATION, HOWEVER, IS NOT SUPPORTED BY THE FACTS IN THE RECORD.

BONOMI MADE HIS COMPLAINT IN A FORM AND CONTEXT THAT SUGGESTS HE WAS VOICING A PERSONAL GRIEVANCE, NOT ATTEMPTING TO ALERT HIS SUPERIORS TO A MATTER OF PUBLIC CONCERN. HIS STATEMENTS WERE MADE ORALLY IN A PRIVATE CONVERSATION WITH HIS SUPERVISOR.

BONOMI REPEATED THESE STATEMENTS IN RESPONSE TO A NEGATIVE PERSONNEL REVIEW AS AN EXPLANATION FOR COMPLAINTS THAT HE KEPT POOR RECORDS.

THE RECORD HERE HAS NOT REVEALED THAT BONOMI MADE ANY ATTEMPT TO REACH THE GENERAL PUBLIC WITH HIS CONCERNS, NOR DO ANY OTHER FACTS IN THE RECORD

SUGGESTS THAT BONOMI HAD THE PUBLIC INTEREST IN MIND. IN FACT, THE RECORD IS FILLED WITH REFERENCES TO PERSONNEL ACTIONS DIRECTED AT BONOMI SUGGESTING THAT HIS REASONS FOR COMPLAINING OF HIS PREDECESSOR'S RECORD KEEPING HAD MORE TO DO WITH HIS PERSONAL DIFFICULTIES THAN WITH ANY CONCERN WITH THE PUBLIC INTEREST.

BONOMI HAS FAILED TO PRESENT EVIDENCE TENDING TO SHOW THE EXISTENCE OF A DISPUTED ISSUE OF FACT THAT HIS SPEECH INVOLVED A MATTER OF PUBLIC CONCERN, AND THAT HE HAS, THEREFORE, FAILED TO SHOW THAT HIS CONDUCT WAS CONSTITUTIONALLY PROTECTED. BONOMI CANNOT THEREFORE RECOVER UNDER SECTION 1983, AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

MS. TIGNO: THANK YOU, YOUR HONOR.

MS. WU: THANK YOU, YOUR HONOR.

MR. WEISS: YOUR HONOR, WILL THERE BE A WRITTEN ORDER ON THIS?

THE COURT: (INDICATING).

MR. WEISS: OH, OKAY. THANK YOU.

(THE MATTER WAS CONCLUDED).

ROSITA FLORES, OFFICIAL COURT REPORTER, USDC